IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 542

AL MARSHALL, ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.,

Respondents.

REPLY MEMORANDUM FOR PETITIONERS

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(1) This case presents the important question whether, consistent with an injunction issued under the *Steele* doctrine, an all-white Brotherhood may expropriate traditional mileage and pay of excluded senior Negro firemen for the benefit of junior white Brotherhood members. In urging this Court's review, petitioners pointed out (i) that the respondent Brotherhood denies Negro firemen the right to membership (Pet. pp. 6, 10), (ii) that the taking of the mileage and pay of Negro firemen was accomplished without any prior notice or hearing to them (Pet. pp. 6, 14), (iii) that only Negro firemen have suffered from the introduction of a swing man (Pet. p. 7), and (iv) that only white firemen have benefited therefrom (Pet. p. 8). Respond-

ents' Opposition nowhere challenges a single one of these four essential facts. We respectfully submit that, when an all-white union takes mileage and pay from Negroes alone for the benefit of whites alone, without so much as notice and hearing to the affected Negroes and in utter derogation of their seniority rights, the case for review has been made. See *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 at 204; Pet. p. 14.

(2) Unable and unwilling to meet the Petition in any way, respondents' Opposition indulges in studied factual complexity and legal avoidance. Certainly the "Facts Bearing Upon Petitioners' Charge of Racial Discrimination," which comprise the bulk of the Opposition (pp. 13-32), are in no sense responsive to the question whether the white Brotherhood may take the traditional mileage and pay of senior Negroes and give it to its junior white members. In this section of its Opposition the Brotherhood refers the Court to a number of charts and tables and in particular to a chart of train assignments on the Central of Georgia. But respondents nowhere attempt to relate these charts and tables to the question at issue. Indeed all these charts and figures were offered to the District Court, which found them irrelevant to the question presented concerning the introduction of a swing man who reduces petitioners' mileage and pay.

The Opposition goes on (pp. 24-26) to characterize as a "wholly mistaken concept" petitioners' contention that, unlike Negro firemen relegated to firing assignments, white firemen are regularly permitted to supplement their pay by working as engineers and hostlers:

> "The contention that white employees, after completing a month's work as firemen, regularly augment their earnings as firemen by taking jobs as engineers or hostlers during the remainder of the

month is completely dissipated by the payroll records disclosing the earnings in each class of service of the white firemen employed on the Columbus Seniority District, reproduced in Chart E of the Appendix" (Op. p. 25).

We have done exactly what the Brotherhood suggests—examined Chart E of the Appendix to the Opposition—and we find that it fully *substantiates* our contention that practically every regularly employed white fireman is permitted to supplement his firing pay by working concurrently as a hostler or engineer. Our addition of the "hostler" and "engineer" pay columns shown in that Brotherhood chart, reveals that while not a single Negro fireman can earn an additional dollar in non-firing capacities, 65 white firemen earned a total of $127,472.38 above their firing pay through exercise of dual seniorities in 1957!

In a word, the bulk of respondents' Opposition—"Facts Bearing Upon Petitioners' Charge of Racial Discrimination"—is irrelevant matter not relied upon by the courts below and intended to give the case an aura of factual complexity which does not exist; in the only area where the Opposition does seek to meet the Petition—on the question of dual seniorities of white firemen—the Opposition is patently erroneous as indicated in the previous paragraph.

(3) Respondents conclude their "factual" material (Op. pp. 29-32) by reference to alleged increases in unemployment among firemen in recent years, which presumably justifies taking the mileage and pay of senior Negroes and giving it to unemployed or underemployed junior white firemen. In our view, reduction in available work for firemen on the Columbus Division could not in any event justify the Brotherhood's selective taking of the mileage and pay of the most senior Negro firemen to distribute it among white firemen: it is after all precisely the significance

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of seniority that in times of hardship or stress it is the junior firemen who have to take the loss rather than firemen, such as petitioners, with decades of seniority.

But the conclusive answer to the Brotherhood's "unemployment" defense of its inroad upon the mileage and pay of senior Negroes is that there is no such unemployment problem on petitioners' division of the Central of Georgia Railway. Throughout the trial of the case in the District Court in 1958, the Brotherhood complained that some of its junior white members desiring to work as firemen were unable to do so because of lack of available work; it asserted that the reduction of petitioners' mileage by the swing man, who is of course still operating on petitioners' run, is justified by the continuing need to find work for junior white firemen. But in May of 1959, while the case was pending in the Court of Appeals, counsel for petitioners learned that, far from any unemployment problem, *ten new white firemen had been hired on the Columbus Division after the trial of the case in the District Court.* This information and the source thereof, as well as the series of communications thereon in June and July of 1959 between counsel for petitioners and the railroad, was presented in a timely petition for rehearing in the Court of Appeals, which is in the record before this Court.

Clearly the railroad would not be hiring new white firemen on petitioners' division if there were unemployed junior white firemen willing and able to resume employment on the division. Indeed, under the seniority rules, the new white firemen on the division *could* not be employed while there were still junior firemen already on the roster willing and able to work. Thus the record shows the Brotherhood's attempted "unemployment" justification of its continuing inroad on the mileage of senior Negroes to be specious—new white firemen are actually being hired

on petitioners' division at the very time that the Brotherhood is here urging that unemployment among junior white firemen justifies the continuing monthly expropriation of the mileage of Negro firemen with forty years' seniority on the railroad. What we now have is not simply a case of the white Brotherhood taking work from senior Negro firemen and giving it to junior white firemen, but rather a case of its taking work from senior Negro firemen and giving it to newly-hired white firemen.

(4) Since the Brotherhood has no adequate or even direct response to the compelling issue presented by the Petition, it now suggests that this Court should refuse review because of the so-called two-court rule (Op., pp. 10-13). But reliance upon this contention is wholly misplaced for petitioners do not ask this Court to "review the evidence of record when there are concurrent findings by two courts below" (Op., p. 11); there was no resolution of conflicting evidence below for the evidence is in no sense conflicting.* On the contrary, "the District Court found and the Brotherhood conceded in that court, in the Court of Appeals and in this Court, the essential facts which show a gross violation of the *Steele* doctrine by the Brotherhood's action against petitioners. These facts are (1) that the Brotherhood without notice or hearing effected an overnight reduction in the traditional mileage and pay of the most senior Negro firemen on the Columbus Division; (2) that the swing man device by which petitioners are being reduced has not been employed by the Brotherhood against white firemen but only against Negroes and indeed there is not one demonstrable dollar of pay which any white

* In essence, what we have here is not District Court findings of fact approved by a Court of Appeals, but erroneous lower court interpretations of, and conclusions from, substantially admitted facts. The refusal of the courts below to find discrimination on these compelling and conceded facts is tantamount to a repudiation of *Steele* itself.

fireman has been caused to lose by the Brotherhood; and (3) that the overnight appropriation of the mileage and pay of the senior Negro firemen has been effected by the Brotherhood for the benefit of its own junior white members. Significantly, in this Court the Brotherhood concedes as it was forced to concede below that "any reduction of the petitioners' mileage is reasonably certain to result, at least ultimately, in the creation of jobs for unemployed *white* firemen" (Op., p. 33), and that "restrictive regulation of the firemen's mileage will likely *cause some senior Negro firemen to earn less mileage, and more jobs will become available for firemen [whites] on the lower positions on the seniority roster*" (Op. p. 7). Precisely that shift of mileage and pay from Negroes to junior whites is, of course, what has occurred in this case. It will occur increasingly in the future if this Court fails to review a decision which permits an all-white Brotherhood, without even notice or hearing and without a shadow of justification, to take the traditional pay of senior Negroes for the benefit of its junior white members.

Respectfully submitted,

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JANUARY, 1960.

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